92-1177

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CARL HAROLD MYERS,
Petitioner
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 8, 1993

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. §242 as amended (November 18, 1988) is unconstitutionally vague for failure to define the added term "bodily injury" which is an essential element of the criminal offense necessary for conviction.

2. In the alternative, whether the District Court erred by speculating and assuming that the civil definition of "bodily injury" as found in 18 U.S.C. §1365 (9)(4) was the definition intended by Congress in the amended penal statute.

3. Whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins as questioned in *Graham v. Connor*, 490 U.S. 386 (1989).

4. Whether the District Court abused its discretion in permitting enhancement of government evidence while disallowing the Petitioner the opportunity to play a complete tape recording of the incident which served as the basis of the criminal prosecution.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Carl Harold Myers and Respondent, United States of America.

All parties above listed are parties to the present proceedings in this Court.

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The Petitioner, Carl Harold Myers, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 25, 1992, and a denial of his Motion for Rehearing entered on November 30, 1992.

OPINIONS BELOW

The full published opinion of the Court of Appeals for the Eleventh Circuit has been reprinted in the appendix hereto, p. 5a, infra, as well as the per curiam opinion denying Petitioner's Motion for rehearing, p. 6a, infra.

STATEMENT OF JURISDICTION

On May 7, 1991, the United States District Court for the Northern District of Georgia, Atlanta Division entered final judgment of conviction sentencing the Petitioner to 18 months imprisonment and a $5,000 fine for two violations of 18 U.S.C. §242. An appeal to the Eleventh Circuit Court of Appeals was timely filed.

On September 25, 1992, the Court of Appeals entered its decision affirming the judgment of the District Court and subsequently denied the Petitioner's Motion for Rehearing on November 30, 1992.

The Jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

18 U.S.C. § 242 *Deprivation of rights under color of law:*

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if *bodily injury* results shall be fined under this title or imprisoned not more

> than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. (emphasis added)

(As amended November 18, 1988, Pub.L. 100-690, Title VII, §7019, 102 Stat. 4396.)

STATEMENT OF THE CASE

Petitioner, Carl Harold Myers, was a Police Captain employed by the City of Doraville, Georgia for 21 years when he was indicted for violation of 18 U.S.C. §242 for use of unreasonable force against two detainees who *never complained of the treatment, never filed a complaint* and *who never sought nor received medical treatment.*

Each allegation involved the use of a stun gun[1] against suspects previously arrested but who were not yet processed, searched, fingerprinted or photographed. In each case the suspect had either resisted arrest, threatened officers with physical injury or attempted not to be searched. In each case Captain Myers as the Watch Commander either assisted a lone inexperienced radio operator or a second police officer in removing the suspect from his cell to be searched or to be shackled to a cell bunk.

Captain Myers readily admitted using the stun gun but argued that such use was deemed necessary, reasonable and resulted in no physical injuries to the individual in custody.

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[1]Stun Gun: is an electrical device, powered by a 9 volt rechargeable battery which produces a shock equivalent to static charge by touching a door knob; it affects muscle movement but produces no permanent injury.

YANEZ INCIDENT

On September 21, 1989 Cesar Yanez (a.k.a. Paul Reynaga) was arrested by a police sergeant who requested assistance when the suspect threatened to shoot and fight the Sergeant while being transported to police headquarters. Upon arrival at the Doraville City Jail, Yanez challenged officers to a fight and refused to give his name or identity. He was therefore placed in a holding cell until a search and "book-in procedures" could be completed.

Later that night, radio dispatcher Fleming told Captain Myers that "we're going to have to fight this one" and that Yanez had threatened to kill him. Fleming was concerned for his own safety, was unarmed and had no prior police training on handling violent prisoners.

Captain Myers had previously purchased a stun gun after determining that the use of a nightstick or similar impact weapon could severely injure and harm an individual. He had also previously assisted in drafting a police regulation regarding the use of approved law enforcement devices within the Doraville Police Department which included a stun gun.

After being informed of prior problems the arresting officer had with Yanez, Captain Myers obtained his stun gun from the Watch Commander's desk and approached the holding cell activating the device in front of the prisoner, asking him if he knew what the device was.

Captain Myers then informed Yanez that the device would be used if he did not settle down and allow himself to be searched. Captain Myers explained the reason he activated the stun gun was to deter Yanez from further acts of violence and to have him cooperate with the necessary

book-in procedures without having to use force or cause injury.

Captain Myers testified that as he entered the holding cell Yanez clenched his fists but finally walked out of the cell. Captain Myers then placed the stun gun towards the back of Yanez's shoulder and placed his other hand on Yanez's chest so he could detect any movement the prisoner might make to strike the Captain or radio dispatcher Fleming. As Captain Myers began walking Yanez to the cell area to search him for weapons Yanez clenched his fists and grabbed cell bars with both hands refusing to move or be searched. Each time Yanez clenched his fist the stun gun was activated and Yanez did not resist any further. After finally reaching the cell area, radio dispatcher Fleming began the necessary search of Yanez while Captain Myers continued to hold the inactivated stun gun on the prisoner's back. While radio dispatcher Fleming was searching Yanez, he clenched his fist, looked at Fleming and pulled his hand away from the wall which Captain Myers interpreted as an attempt to strike Fleming. This occurred four times during the search and each time Captain Myers activated the device in order to control the prisoner. Yanez did not yell or complain but instead told Captain Myers, *"If that is all you got, I can take a whole lot more."* After the search Yanez was placed in a cell and Captain Myers told Fleming he was surprised the stun gun even worked since he had not charged the battery. Both Defendant and government experts agreed that a fully charged stun gun would have caused the prisoner to fall to the ground.

Yanez made no complaints about the use of the stun gun, did not seek nor receive medical attention, and testified he went back to his cell and slept. Yanez later refused

to sign a complaint against Captain Myers when asked to by Detective Welch during the investigation which followed.

After Yanez was processed and released Captain Myers completed his tour of duty and went home. A few days later when Yanez was arrested on other charges, Major Davis noticed some red dots on the prisoner's back together with a large scar created by a prior bullet wound and ordered an internal investigation. Captain Myers immediately gave a written statement admitting use of the stun gun and explaining why it was needed.

Lt. Welch in his investigation of the Yanez incident expanded the investigation beyond the Yanez incident to include the entire 21 year career of Captain Myers and began asking each radio dispatcher and officer if they had ever seen Captain Myers use the stun gun before. Consequently, the prior August 25, 1988, incident involving the arrest of Frederick Cowan was discovered as well as the prior arrest of Marvin L. Breckenridge on July 19, 1989, which involved the use of the stun gun. *At the time of the actual incidents neither Cowan, Yanez or Breckenridge had made any complaint regarding use of the stun gun.* Instead the investigator went searching for these individuals previously arrested to find someone to make a complaint.

COWAN INCIDENT

Based upon the internal affairs investigation it was learned that on August 25, 1988, Frederick Cowan was arrested by Doraville Police Officers Ceravolo, Brown and Pritchett for driving without headlights, resisting arrest, D.U.I., damage to city property and driving with a suspended license. Sgt. Brown was kicked during the arrest

and Cowan kicked out a section of the plexiglass screen separating the back seat from the front of the police car. When Cowan was placed in a jail cell he proceeded to break the bed by lifting and dropping the heavy metal frame. He was yelling, screaming and cursing. Radio Dispatcher Fleming was also a government witness in this matter. Fleming, age 18, was unarmed, without prior police experience and was being trained by radio dispatcher Clint Jett, when Cowan had to be forcibly placed in a cell by police officers. According to Fleming, "he looked violent" and would not walk to the cell.

At approximately 5:15 a.m., Captain Myers, who was then a Lieutenant, reported for duty as the Watch Commander. As he approached the doorway of police headquarters he heard screaming, cursing, hollering, and someone striking metal. Lieutenant Myers asked radio dispatcher Jett what was happening and was informed that Cowan was high on dope, had been fighting with police officers, that two officers had been hurt in attempting to arrest him and that Cowan had broken his prison bunk.

The Doraville Police Department had a standard operating procedure which required the shackling[2] of prisoners if the individual might injure themselves or city property. Lieutenant Myers looked into the cell and observed Cowan screaming, cursing and jerking the bunk up and down. When asked why the prisoner had not been shackled, radio dispatcher Jett responded he was "scared to go back there." Lieutenant Myers, in order to protect the prisoner from injury and to prevent further destruction

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[2]Shackling: is a procedure where the prisoner is handcuffed with his hands attached to one end of the bunk and his feet cuffed at the opposite end to prevent injury to the prisoner or damage to the cell.

of property, decided to shackle the prisoner and there fore again obtained the stun gun from the Watch Commander's Office in order to protect himself and radio dispatcher Jett. Lieutenant Myers directed Cowan to move away from the cell door and back to the wall so he could safely enter the cell. Cowan's response was "M.F. I'm not going anywhere." At which time, Lieutenant Myers held the stun gun up to the bars and activated the device and entered the call. He activated it a second time in the air when the prisoner refused to sit on the bunk to be shackled. When the prisoner again refused to sit down the stun gun was actually placed against the prisoner's upper chest area, activated and the prisoner sat down.

During the attempt to shackle the prisoner's legs the stun gun was used a second time above the prisoner's stomach. However, at trial Cowan testified it was applied to his groin area. Notwithstanding his trial testimony Cowan made no complaints at the time of the incident to police about use of the stun gun and did not seek medical attention.

At the time of this incident Jett had a tape recorder which recorded the behavior of Cowan and what was heard in the jail. The tape was admitted without objection but the Court only permitted a select portion to be played for the jury by the government over objection of Petitioner's counsel who requested that the entire tape be played. Government witness Cowan failed to produce any medical bills or receipts indicating any medical treatment or any photographs showing any physical injuries or harm caused. There was absolutely no medical evidence to support Cowan's story.

The government failed to produce Mr. Breckenridge for trial and a mistrial was declared as to Count II of the indictment. However, the Petitioner was found guilty of Count I, (Cowan) and Count III (Cesar Yanez) and was sentenced to 18 months in jail and a $5,000 fine.

Subsequently, the Petitioner filed his appeal to the Eleventh Circuit Court of Appeals setting forth 1) constitutional and 2) evidentiary grounds for review.

Petitioner argued that the District Court erred by applying the Fourth Amendment standard to the facts in this case in light of the fact that the alleged excessive use of force occurred *after* arrest but *before* arraignment or any probable cause hearing, citing the decision in *Graham v. Connor,* 490 U.S. 386 (1989). Petitioner argued that the Fourteenth Amendment standard should have applied to this case. The Court of Appeals, while upholding the District Court's Fourth Amendment jury charge, made it explicit that such a ruling did not exclude application of the Fourteenth Amendment's "shocking to the conscience" standard in such cases.

Prior to November 18, 1988, violation of 18 U.S.C. §242 constituted a misdemeanor punishable by imprisonment for one year. The only element necessary for conviction was deprivation of rights under color of law.

However, the subsequent amendment enacted November 18, 1988, made violations a felony and added the following element:

> "and if *bodily injury* results shall be fined under this title or imprisoned not more than ten years, or both;" (emphasis added).

The term *"bodily injury"* was not defined nor was there any indication by Congress what types of injuries constituted a violation of the criminal statute. The Eleventh Circuit Court of Appeals in *Bennett v. Parker,* 858 F.2d 1530 (1990) had previously ruled that "not every push or shove constituted a violation of a prisoner's constitutional rights.

Evidence in this case showed that no physical injuries were sustained and no medical treatment was sought. However, there was testimony that the stun gun had caused "pain" and that "signature marks," which are only temporary and readily disappear, may have been caused by the stun gun.

Notwithstanding such evidence and a lack of any definition of what the term "bodily injury" may mean in the penal statute the District Court gave a civil definition of "bodily injury" found in *"Tampering With Consumer Products,"* at 18 U.S.C. § 1365 (g)(4) as follows:

> "You are instructed that bodily injury means any injury to the body, no matter how temporary. Bodily injury also includes physical pain as well as any burn or abrasion."

Upon review, the Court of Appeals in finding no error opined that when Congress uses but does not define a particular word it is presumed to have adopted the word's established meaning. The Court further cited the following statutes which define "bodily injury," 18 U.S.C. §831 (f)(4); prohibiting transactions Involving Nuclear Materials; § 1365(g)(4) Tampering With Consumer Products; § 1515 (a)(5) Obstruction of Justice; and § 1864 (d)(2) Hazardous or Injurious Devices on Federal Lands.

The Petitioner argued that civil definitions not contained within a penal statute should not be considered and in support cited *United States v. Turley,* 352 U.S. 407 and *United States v. Kattan Kassin,* 696 F.2d 893 (1983).

On the issue of enhancement of evidence, the District Court permitted the government to fully re-charge and activate the stun gun before the jury even though one of the crucial issues in the criminal prosecution was the electrical condition of the stun gun when used and whether Lieutenant Myers intended to use the device to cause "bodily injury" in violation of the prisoner's constitutional rights. Petitioner argued such demonstrations were prejudicial and in conflict with the decision in the Fourth Circuit Court of Appeals in *United States v. Calhoun,* 726 F.2d 162 (1984).

Petitioner further argued that the District Court erred by disallowing the playing of the entire tape of victim Cowan after the government was permitted to play select portions which indicated that Cowan was calling for a doctor while in his cell. The Petitioner cited Federal Evidentiary Rule 106, *United States v. Ebens,* 800 F.2d 1422 (6th Cir. 1986) and *Stewart v. Dameron,* 460 F.2d 279 (5th Cir. 1972) in support thereof. In determining that no error occurred, the Eleventh Circuit Court of Appeals ruled that the purpose of Rule 106 would not have been served by allowing the Petitioner to play the entire tape since the Court did allow the Petitioner to play specific selections.

The Eleventh Circuit affirmed the decision holding that the District Court did not abuse its discretion and subsequently denied the petitioner's Motion for Rehearing.

Petitioner contends that this decision effectively removed proof of a necessary element ("bodily injury")

from 18 U.S.C. § 242 needed for conviction and thereby subjects law enforcement officers in the future to criminal prosecution absent any corroborating evidence that the alleged excessive force resulted in bodily injuries as compared to a mere push or shove.

Furthermore, this Court has not definitively decided whether the Fourth or Fourteenth Amendment continues to apply after arrest but before arraignment situations. Consequently, conflicting opinions and interpretations are being issued from the various Appellate Circuit Courts. In *Graham v. Connor, supra,* this Court invited an appeal which would allow such a definitive decision. Petitioner respectfully contends the present facts present such a case for review.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Application Of Fourth Amendment Standard Is In Direct Conflict With Prior Eleventh and Seventh Circuit Opinions

(Questions 1 and 2)

In *Graham v. Connor, supra,* this Court determined that the Fourth Amendment's "objective reasonableness standard," rather than the "substantive due process standard" applied in cases involving claims that law enforcement officials used excessive force in making the arrest or other seizure. Additionally, in *Bell v. Wolfish,* 441 U.S. 520 (1979) this Court determined that the Due Process Clause protects a pretrial detainee from the use of excessive force which amounts to punishment. However, as pointed out in *Graham,* this Court has yet to decide which constitutional right affords protection to individuals who have been arrested and who are in police custody but who have not been formally charged or arraigned. In *Graham,* this Court at footnote [6b, 7b] stated:

> "Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."

This "gray area," where the suspect is being held for subsequent judicial processing and has not yet been searched, fingerprinted, or photographed, is precisely the factual situation presented in this case. The alleged "victims" had been seized by virtue of their arrest but had not yet been convicted so as to provide constitutional rights under the Eighth Amendment. The District Court applied the Fourth Amendment Standard to this fact pattern which the Petitioner contends was error. The Court of Appeals, while finding such a jury instruction not to be plain error, failed to decide whether the Fourteenth Amendment's "shocking to the conscience" standard was applicable, which was argued by the Petitioner during the trial. The Petitioner raised The Fourteenth Amendment argument at trial albeit once.

This Circuit's decision upholding the application of the Fourth Amendment Standard to the Facts in the present case is in direct conflict with opinions issued by the Seventh Circuit in *Wilkins, Jr., v. May,* 872 F.2d 190 (1989), which cited prior Fifth Circuit decisions.

An affirmative decision issued from this Court would allow a uniform application of either the Fourth or Fourteenth Amendment Standard to post arrest and pre-arraignment type cases occurring throughout our nation. Such a decision will also provide needed guidance to appellate courts in such cases.

A Circuit Court of Appeals Does Not Have Legislative Authority to Apply A Civil Definition To Omitted Elements In A Penal Statute
(Question 3)

Congress, by amending 18 U.S.C. § 242, increased the penalty for violation to imprisonment for ten years and made such offense a felony if "bodily injury" occurred. In order to convict under the statute there must be a finding that "bodily injury" was caused, but the criminal statute fails to identify what is meant by the term "bodily injury." This failure to define an essential term of the criminal statute is particularly prejudicial in the present case since the alleged victims never voiced complaints nor sought medical treatment and in one case even refused to sign a complaint against the officer, (Yanez).

This Court has previously held that penal statutes are to be strictly and narrowly construed to insure that no individual is convicted unless a fair warning has first been given to the individual of what the law intends to do if a certain line is passed. *United States v. Resnick, et. al.*, 299 U.S. 207 (1936), *McBoyle v. United States*, 283 U.S. 25 (1931), and *Mourning v. Family Publications Service, Inc.*, 411 U.S. 375 (1973).

Furthermore, the Eleventh Circuit's holding in *Bennett v. Parker*, 898 F.2d 1530 (1990) is contrary and in conflict with its present holding. In *Parker*, the Eleventh Circuit ruled that not every push or shove constitutes a violation of a prisoner's constitutional rights. However, under the court's present opinion even a mere push or shove if it produced any pain or a temporary mark would constitute a "bodily injury." However, under 28 U.S.C. § 1983 other similar cases were dismissed on identical

claims, *i.e., slaps to the face* that caused no bleeding, *Mark v. Caldwell*, 754 F.2d 1260 (5th Cir. 1985), *minor bruises* on the arm, scrapes on face and welts raised by handcuffs, *Raleg v. Fraser*, 747 F.2d 287, 289 (5th Cir. 1984) bruises on the legs, *Culver, supra*, p. 1058.

Similarly, the courts in analyzing whether force was required or whether the force was excessive have denied claims when the officer used his fist and knocked a prisoner to the ground even when the only overt action by the prisoner consisted of movement of his hands which the officer interpreted as threatening. *Lamb v. Cartwright*, 393 F. Supp. 1081 (E.D. Texas, 1975). Certainly, Congress in increasing the penalty imposed for causing "bodily injury" did not intend such result. Persons may not be required at their peril of life, liberty, or property to speculate concerning the meaning of a penal statute, but are entitled to be informed concerning what is forbidden by law. *Lanzetta, et. al. v. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939).

In *Lanzetta*, the Supreme Court reversed a conviction when the penal statute failed to define the term "gang." Similarly, in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988), this Supreme Court reversed convictions when the underlying statute contained the undefined terms, "heinous, atrocious and cruel."

Appellant Myers stands convicted of violating a penal statute which failed to define a necessary element. We may only speculate or guess at what constitutes "bodily injury." To the majority of people injury to the body denotes more than a scrape, abrasion or marks which disappear in a few days. As the Supreme Court decided in *United States v. Evans*, 333 U.S. 483, 68 S.Ct. 634 (1948), courts should

not make speculation the law or guess at several possible constructions which Congress may have intended. Consequently, the definition and charge given by the Court constitutes reversible error.

ENHANCEMENT OF EVIDENCE

(Question 4)

The District Court's departure from accepted and usual judicial rulings in permitting the government to enhance evidence by fully charging an inoperable stun gun and then prohibiting the Petitioner from playing an entire tape recording crucial to his defense are contrary to Federal Rule 106 and previous appellate court decisions thereunder.

One of the critical issues in this case was the actual condition of the stun gun battery at the time of its use.

Despite the admission by the government expert that the battery was in a *discharged condition* when received and testimony from Yanez and Petitioner Myers that the device was in a weakened condition, the District Court allowed the government to recharge the battery before trial and activate it inches from the jury.

The government in questioning Fleming failed to even lay a proper foundation to show that the electrical charge or arc produced by the fully charged battery was the same as the condition of the stun gun when activated against the prisoners. Fleming heard the stun gun activated but never testified that he saw the device used or the arc produced between the two electrodes.

The panel did not address why the court decided to favor the government's contention that the stun gun was

fully charged at the time of the events as opposed to the Defendant's opposite contentions, especially when there was *no evidence* supporting the government's position *before* the trial of the case. Furthermore, no evidentiary hearing was conducted prior to admission and demonstration of the device.

In *United States v. Calhoun*, 726 F.2d 162 (4th Cir. 1984) the circuit court reversed a case less egregious when the prosecutor during cross-examination struck the counsel table with a flashlight similar to the one used on the victim in order to emphasize the seriousness of the blow inflicted.

If there was a question regarding the condition of the stun gun why did the court allow enhancement of the government's evidence, thereby prejudicing the rights of the accused, when the battery could have been removed, thereby allowing each side an equal opportunity to argue the issue to the jury? Such authorized enhancement is more than just harmless error and represented an abuse of discretion.

During the incident regarding Cowan, radio dispatcher Jett recorded the voice of Cowan and the sound of the bunk being slammed up and down.

The tape was admitted by the government on its direct case without objection and a brief portion of the tape was played allowing the jury to hear Cowan *yelling for a doctor*. Petitioner Myers' counsel requested that the entire tape be played and the court refused. After a discussion with counsel the court admonished Petitioner's counsel that he could only select a brief portion he desired to play on the Petitioner 's direct case but the Court was not gong

to *"sit and listen to 20 or 30 minutes of the same type of repetitious noise."*

Petitioner contended that the tape had to be played in its entirety for *three* crucial reasons. *First,* as the panel correctly found to rebut the testimony of Cowan, *second* to show Cowan was yelling for a doctor *before* the stun gun incident and *third,* to establish the time of arrival of Petitioner Myers.

The *only* way to determine if Cowan was still yelling and slamming his metal cell bunk when the Petitioner arrived at 5:25 a.m., was to measure the duration of the tape against a *known time* on the tape. In the very beginning of the tape a telephone conversation was recorded with "Mary Beth" who was requested to report for work. She asked what time it was and Dispatcher Jett replied *4:50 a.m.* By listening and timing the complete tape (35 minutes) the jury would have arrived at a time of 5:25 a.m., which was the time Appellant Myers testified that he reported for duty. Without both *timing* and *hearing* of the complete tape the defense was prejudiced by relying merely upon the testimony of the Petitioner Myers against the testimony of Cowan who testified that he was quiet when Captain Myers arrived. The Court missed the point, the entire tape was needed not only for its content but for its *length.*

Since the issue was the behavior of Cowan and the response of Petitioner Myers upon confronting this conduct, the complete tape was necessary and failure to allow defense to play the entire tape constituted reversible error and was contrary to the holdings in other circuits. *United States v. Ebens,* 800 F.2d 1422 (6th Cir. 1986); *Steward v. Dameron,* 460 F.2d 279 (5th Cir. 1972).

CONCLUSION

Absent a review of this case, every law enforcement officer in this country, notwithstanding his or her good faith desire not to cause physical injury to a suspect in detention, will be exposed to the risk of federal criminal prosecution if the alleged suspect later complains of any physical pain, no matter how temporary, as well as any abrasion while in custody. Petitioner respectfully contends that such a result is absurd and is not what our legislature intended when 18 U.S.C. § 242 was amended to add the term "bodily injury."

Furthermore, absence of the definition of "bodily injury" from the statute does not warrant or justify speculation or remedial legislation by our appellate courts in adopting civil definitions to remedy a defective penal statute. Consequently each circuit will be permitted to adopt its own definition of "bodily injury" on a case by case basis.

Furthermore, the application by the District Court of the Fourth Amendment standard instead of the Fourteenth Amendment standard in a post arrest/ pre-arraignment case constitutes reversible error and is in conflict with existing United States Supreme Court decisions.

The seriousness of this case and the constitutional impact such a decision has on future federal prosecutions based upon 18 U.S.C. § 242 is readily apparent in light of the fact that a 21 year police veteran stands convicted of causing bodily injury to two prisoners who never com-

plained about the treatment, never sought medical care, and who refused to sign a complaint against the officer.

Therefore, it is respectfully requested that the Writ of Certiorari be granted.

This 8th day of January, 1993.

Respectfully Submitted By:
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APPENDIX OF PETITIONER

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UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA	:	
	:	
v.	:	
CARL HAROLD MYERS,	:	Case Number:
	:	1:90-cr-319-01-JTC
Defendant.	:	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, CARL HAROLD MYERS, was represented by William J. McKenney, Esq..

The defendant was found guilty on court(s) one and three (1 & 3) after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
18 USC 242	Interference with Civil Rights under color of law	1& 3

As pronounced on 5/7/91, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $75.00, for count(s) 1 & 3, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 8 day of May, 1990.
Jack Carye
United States District Judge

Defendant's Soc. Sec. No.: 253-64-8091
Defendant's Date of Birth: 4/5/44
Defendant's address: 1454 Milford Church Rd., Marietta, GA 30060

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of twelve months on count one and eighteen months on count three to run concurrent with count one.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons within 45 days.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of two (2) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $5,000.00. This fine includes any costs of incarceration and supervision.

This fine (plus any interest required) shall be paid on terms as directed by the Probation Office.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

UNITED STATES of America, Plaintiff-Appellee,

v.

Carl Harold MYERS, Defendant-Appellant.

No. 91-8567.

United States Court of Appeals, Eleventh Circuit.

Sept. 25, 1992.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, JOHNSON, and BOWNES*, Senior Circuit Judges.

BOWNES, Senior Circuit Judge:

Appellant, Carl Harold Myers, former Doraville Police Department Captain, was convicted on two counts of depriving two arrestees, Frederick Cowan and Gabriel Raul Reynaga (also known as Cesar Yanez, which is the name we use), of their civil rights under color of law, in violation of 18 U.S.C. § 242 (1992),[1] by using a stun gun to

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* Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

[1] 18 U.S.C. § 242 provides in pertinent part,

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both....

shock them. Appellant raises numerous contentions on appeal, arguing that the district court committed errors in three areas: 1) the applicable standard of reasonable force; 2) jury instructions; and 3) evidentiary rulings. We find that there are no grounds for reversal.

BACKGROUND

We review the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Perez*, 956 F.2d 1098, 1102 (11th Cir.1992).

I. THE FACTS

At the time the incidents giving rise to the criminal action occurred, Myers was a captain in the Doraville Police Department. He had been with the police department for twenty-one years.

A. Cowan

On August 25, 1988, around 1:30 a.m., officers of the Doraville Police Department arrested Frederick Cowan at his home for driving without lights, driving while under the influence, and resisting arrest. Cowan was taken to the station and placed in a holding cell. Cowan had been drinking prior to his arrest. According to radio dispatcher Ryan Fleming, who testified as a government witness, Cowan "looked violent" as he was led handcuffed to the cell. Throughout the night, Cowan yelled, rattled and kicked the bars of his cell, and asked to see a doctor.

Around 5:15 or 6:00 that morning, Myers reported for duty as the watch commander at the station. Myers testified that he was informed by radio dispatcher Clint Jett that Cowan was high on dope, had been fighting with po-

lice officers, had broken his prison bunk, and that two officers had been hurt in attempting to arrest him. Myers further testified that when he asked Jett why Cowan had not been shackled,[2] Jett responded that he was "scared to go back there."

Myers went to his office, which was upstairs in the station, to obtain his stun gun that he kept inside his desk. A stun gun is a battery-operated device that sends electrical voltage into a person's body when fired. The electric charge retards or paralyzes muscle movement for a period of time.

Myers had purchased the stun gun in 1988 or 1989 when he was then a Lieutenant with the Doraville Police Department. He purchased the gun for use against "rowdy prisoners." Chief Everett and Assistant Chief William Davis of the Doraville Police Department both had informed Myers that the stun gun was unauthorized and told him not to use it. Doraville Police Department regulations provided that an officer could not use a stun gun without official authorization.

Myers, accompanied by Jett and Fleming, entered Cowan's cell with the stun gun. Myers directed Cowan to move away from the cell door with his back to the wall so that he could safely enter the cell. Cowan responded, "M.F. I'm not going anywhere." Myers activated the stun gun and entered the cell. He asked Cowan to lay down and stretch his hands above his head so that he could be handcuffed to the bunk. When Cowan, who was sitting on the

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[2] Shackling is a procedure by which the prisoner is handcuffed with his hands attached to one end of the bunk and his feet cuffed at the opposite end, in order to prevent injury to the prisoner and/or damage to the cell.

bunk, failed to respond, Myers aimed the stun gun at Cowan's chest and fired it. Cowan closed his eyes, looked as if he was in pain, screamed loudly, and in a movement like a muscle contraction, laid down flat on his back on the bunk. Jett then handcuffed Cowan's hands over his head. As Jett was facing the wall pushing Cowan's legs down to shackle them, Myers aimed the stun gun at Cowan's groin area and fired it. Cowan screamed loudly and flinched. Jett then shackled Cowan's feet to the end of the bunk. Cowan had neither been fingerprinted nor booked when these events occurred.

Fleming testified that the next day, Jett expressed concern about what would happen if anyone learned of the incident and told Fleming that he "needed to be careful what [he] said about the incident that happened." Fleming further testified that Myers told him that he was "going to be the one to clear [Myers]," and that he "remembered the ones that helped him and the ones that hurt him."

B. Yanez

During the early morning hours of September 21, 1989, the Doraville Police arrested Cesar Yanez in a parking lot for having an open can of beer in public. The arresting officer radioed ahead for assistance because Yanez was yelling obscenities as he was being transported to the police station. When Yanez arrived at the station, he continued to yell obscenities and challenged various officers to a fight. The officers laughed at Yanez, who was five feet two inches and weighted 115 pounds, and appeared to be intoxicated. Myers grabbed Yanez by the throat and told him not to scream at the officers.

Yanez was taken to a holding cell inside the station. While in the cell, Yanez continued yelling obscenities and

making threatening remarks. Myers entered the cell, showed Yanez the stun gun, activated it, and asked him if he had ever seen one before. Yanez responded, "Maybe I have and maybe I haven't." Myers then informed Yanez that the stun gun would be used if he did not settled down and allow himself to be searched.

Myers then told radio dispatcher Fleming to escort Yanez out of the cell to the back area of the station to be booked, searched, and processed. Myers walked Yanez down the corridor with the stun gun aimed at Yanez's back, between the shoulder blades. Myers kept his other hand on Yanez's chest. Before they reached the cell door area, Myers fired the stun gun. Fleming testified that at the time, Yanez was turning his head talking. Myers fired the stun gun again when Yanez grabbed the cell bars. Yanez was then placed up against a wall, with both hands against the wall and legs spread, so Fleming could search him. Fleming testified that Yanez complied with orders to remove his personal property from his pockets and did not make any threatening moves.

During the frisk, Myers fired the stun gun against Yanez's lower neck and upper back area. Yanez flinched and then looked at Myers and said, "If that is all you got, I can take some more." Yanez did not remove his hands from the wall or attempt to strike the officers. Yanez and Myers got into a shouting match and Myers fired the stun gun at Yanez a few more times.

On September 25 and 26, 1989, Lieutenant Welch, a nineteen-year veteran of the force, observed Yanez's back and saw six pairs of scabbed reddish burn marks approximately two and one half inches apart. Lieutenant Welch

testified that the marks were consistent with those left by a stun gun.

II. LEGAL PROCEEDINGS

On March 8, 1991, a jury convicted Myers of violating the civil rights of Cowan and Yanez, while acting under color of law, by shocking them with a stun gun, in violation of 18 U.S.C. § 242. The jury found that the violation of Yanez's civil rights resulted in his bodily injury. The district court sentenced Myers to twelve months imprisonment for violating Cowan's civil rights and eighteen months for violating Yanez's civil rights, to be served concurrently. If also imposed a fine of $5,000 and a special assessment of $75. Myers filed this timely appeal.

DISCUSSION

I. THE CONSTITUTIONAL STANDARD

The district court instructed the jury to evaluate Myers' conduct under an objective reasonableness standard.

> All persons live under the protection of our constitution and have the legal right at all times to be protected from any official use of force which is unreasonable and excessive. . . . To determine whether the acts, if any, were beyond the lawful authority possessed by defendant as a police officer, you must determine whether the force used was unreasonable. Whether or not the force used by a police officer was unreasonable is an issue to be determined by you in the light of all the surrounding circumstances, on the basis of that degree of force a reasonable

> and prudent officer would have applied under the circumstances in this case.

In his pretrial discussions with counsel, the district court made it explicit that he was applying the Fourth Amendment standard.

Myers objected to the excessive force instruction, arguing that the Eighth Amendment standard of "malicious and sadistic force applied for the very purpose of causing harm" should have been given instead. On appeal, Myers has raised for the first time the contention that the Fourteenth Amendment "shocking to the conscience" standard governs. Federal Rule of Criminal Procedure 30 provides in pertinent part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects *and the grounds of the objection.*

(emphasis ours).

In *United States v. Hines*, 955 F.2d 1449 (11th Cir.1992), this circuit stated:

> According to the Federal Rules of Criminal Procedure, absent timely objection, only *plain error* in a charge warrants reversal. Fed.R.Crim.P. 30; Fed.R.Crim.P. 52(b). Plain error results only if "when examined in the context of the entire case, [it] is so obvious that failure to notice it would seriously affect the fairness, integrity and public reputation of the

> proceedings." *United States v. West*, 898 F.2d 1493, 1498 (11th Cir.1990), *quoting United States v. Walther*, 867 F.2d 1334, 1343-44 (11th Cir.1989).

Id. at 1453.

Because of defendant's failure to state that the Fourteenth Amendment was one of the grounds of this objection to the charge, the Fourth Amendment instruction is subject to attack only on Eighth Amendment grounds. It is beyond cavil that the Eighth Amendment applies only after a prisoner is convicted. *See Graham v. Connors*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). "[T]he less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Id.* at 398-99, 109 S.Ct. at 1873, *quoting Ingraham v. Wright*, 430 U.S. 651, 671 n. 40, 97 S.Ct. 1401, 1412 n. 40, 51 L.Ed.2d 711 (1977). *See also Whitley v. Albers*, 475, U.S. 312, 327, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986) (after conviction, the Eighth Amendment "serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified."). Cowan and Yanez had not been convicted of any crimes at the time Myers used the stun gun on them. We reject Myers' contention that the Eighth Amendment standard applies in evaluating his use of excessive force.

Although we uphold the instruction given, we wish to make it explicit that we are not deciding that the Fourteenth Amendment's "shocking to the conscience" standard does not apply in evaluating the use of excessive force by the police in post-arrest, pre-charge cases. That issue is not before us. We hold only that it was not plain error for the district court to give the instruction it did.

II. JURY INSTRUCTIONS

We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party. *See Johns v. Jarrard*, 927 F.2d 551, 554 (11th Cir.1991); *National Distillers, etc. v. Brad's Machine Products*, 666 F.2d 492, 497 (11th Cir.1982).

Myers contends that the court erred threefold in charging the jury: 1) in its definition of "bodily injury"; 2) in refusing to give two requested instructions; and 3) in its instruction as to intent.

A. Definition of "bodily injury"

In defining "bodily injury," the court gave the following instruction:

> Counts Two and Three charge the defendant's acts resulted in bodily injury to the persons in custody named in those counts. You are instructed that bodily injury means any injury to the body, no matter how temporary. Bodily injury also includes physical pain as well as any burn or abrasion.

The defense objected to the instruction as being "overly broad, vague, and not defined in the criminal statute," but did not provide the court with an alternative definition of "bodily injury." On appeal, Myers claims that the court should have used the Georgia state definition of "bodily injury," under the State's battery statute:

> (b) As used in this code section, the term "visible bodily harm" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to,

> substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.

O.C.G.A. § 16-5-23.1. We disagree. We are dealing with a federal crime involving police behavior. Federal law controls.

Courts should give statutory language its ordinary, usual, and plain meaning. *See Connecticut Nat'l Bank v. Germain*, __ U.S. __, __, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992); *Ardestani v. I.N.S.*, __ U.S. __, __,112 S.Ct. 515, 519, 116 L.Ed2d 496 (1992); *Gulf Life Ins.*, 809 F.2d 1520, 1522 (11th Cir.1987). The problem is that the statute in question, 18 U.S.C. § 242, does not define "bodily injury." It states that "[i]f *bodily injury* results [from a violation of the statute, the violator] shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life." 18 U.S.C. § 242 (emphasis added). When Congress uses, but does not define a particular word, it is presumed to have adopted that word's established meaning. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). "Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida Nat'l Guard v. Federal Labor Rel. Auth.*, 699 F.2d 1082, 1087 (11th Cir.), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983). "Congressional silence in the Act indicates acceptance of the prior practice." *Id.*; *see also Estate of Wood v. C.I.R.*, 909 F.2d 1155, 1160 (8th Cir.1990).

Congress has defined "bodily injury," in many different contexts. The definition commonly used is, "the term

'bodily injury' means — (A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." *See* 18 U.S.C. §§ 831(f)(4) (prohibiting transactions involving nuclear materials); 1365(g)(4) (tampering with consumer products); 1515(a)(5) (obstruction of justice); 1864(d)(2) (hazardous or injurious devices on federal lands). This definition of "bodily injury" comports with that used by the district court in instructing the jury. The court did not err.

B. Jury Instruction on Presumption of Intent

Myers contends that the court committed reversible error in its instruction on intent because it impermissibly shifted the burden of proof.[3] Defendant objected to the following sentence in the instruction: "For example, you may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done." Myers contends that the instruction as given created a presumption which shifted the burden of proof to him

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[3]The court gave the following instruction on specific intent:

With regard to specific intent, you are instructed that intent is a state of mind and can be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. In determining whether this element of specific intent was present, you may consider all of the attendant circumstances of the case.

For example, you may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may in this case infer and find that the defendant intended all the consequences that a person, standing in like circumstances and possessing like knowledge, should have expected to result from his or her act or acts knowingly done. This would be circumstantial evidence of his intent. However, you must still be convinced beyond a reasonable doubt that the defendant willfully deprived the person in custody of his constitutional rights.

once the government had proven the predicate acts. He further argues that the jury could have read the instruction as requiring it to infer the intent to violate a constitutional right and to cause bodily injury as a natural and probable consequence of the act of using a stun gun on arrestees.

In determining whether an instruction impermissibly shifts the burden of proof to a defendant, the threshold inquiry is whether the challenged portion of the charge creates a mandatory presumption or merely a permissive inference. *See Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 1971, 85 L.Ed2d 344 (1985); *Santiago Sanchez Defuentes v. Dugger*, 923 F.2d 801, 804 (11th Cir.1991). We must review the challenged jury instruction by reviewing the entire jury charge. *Santiago Sanchez Defuentes*, 923 F.2d at 804. A permissive inference or presumption allows, but does not require, the jury to "infer the elemental fact from proof by the prosecutor of the basic one and [ ] places no burden of any kind on the defendant." *Id. quoting Ulster County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979). A permissive inference is not burden shifting and, therefore, does not violate the due process clause. *Id.*

We find that the court's jury instructions as to intent created a permissive inference and did not shift the burden of proof onto Myers in violation of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (invalidating a charge that stated: "[t]he law presumes that a person intends the ordinary consequences of his acts."). The district court explicitly informed the jury that it "may" infer, and not that it "must" infer, intent. This circuit has approved similar jury instructions that allow the jury to infer intent from the natural and probable conse-

quences of an act. *See, e.g., Hill v. Kemp*, 833 F.2d 927, 930 (11th Cir.1987) (charge was "simply a classic circumstantial evidence charge indicating that the jury *may* make certain inferences from the evidence"); *United States v. Cotton*, 770 F.2d 940, 946 (11th Cir.1985) (jury instruction did not relieve prosecution of its burden of proof nor would undermine jury's fact-finding responsibilities).

Examining the jury charge as a whole shows that the court did not relieve the government of its burden of persuasion beyond a reasonable doubt of every essential element of the crime.[4] We conclude that the district court did not err in its instruction on intent.

C. Refusal to Give Jury Instructions

Myers further contends that the court committed reversible error in refusing to give two jury instructions that he requested.

A trial court has wide discretion as to the "style and wording" of jury instructions, and on appeal we review the court's instructions only to determine that they "show no tendency to confuse or to mislead the jury with respect to the applicable principles of law." *Samples v. City of Atlanta*, 916 F.2d 1548, 1550 (11th Cir.1990) (quoting *Andres v. Roswell-Windsor Village Apartments*, 777 F.2d 670, 673 (11th Cir.1985)).

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[4] For example, the court further instructed the jury that,

> The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.... If you find that the government has failed to prove beyond a reasonable doubt that each and every element of the offense is met, you should find the defendant not guilty and acquit him on that count.

We can find that a district court committed reversible error in failing to give a requested jury instruction if, and only if, three requirements are met. The proposed jury instructions must be: 1) correct; 2) not substantially covered by other instructions that were delivered; and 3) so important that the court's failure to give it "seriously impairs the defendant's ability to defend himself." *United States v. McEvoy*, 820 F.2d 1170, 1172 (11th Cir.), *cert. denied*, 484 U.S. 902, 108 S.Ct. 243, 98 L.Ed.2d 201 (1987).

Myers' first claim is that the court should have instructed the jury that it could not consider the fact that a stun gun was an unauthorized weapon in the Doraville Police Department.[5] Myers proffers that this instruction was to rebut evidence introduced that the stun gun was an unauthorized weapon.[6] In determining whether a defendant in an excessive force case has acted "reasonably," it is proper to look to the existence of police regulations. *See Tennessee v. Garner*, 471 U.S. 1, 15-19, 105 S.Ct. 1694, 1703-05, 85 L.Ed.2d 1 (1985). We find no error.

The second jury instruction that Myers claims was erroneously omitted has to do with his theory of defense. The proposed instruction reads as follows:

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[5]The requested charge stated:

Ladies and Gentlemen of the Jury, I charge you that whether the stun gun in this case was authorized or unauthorized by the Doraville Police Department is not an element of the crime alleged in the indictment and should not be considered in deciding this case.

[6] At trial, the government introduced into evidence General Order 86-21 of the Doraville Police Department, establishing that the stun gun was not an authorized weapon. In addition, Police Chief Everett and Major Davis testified that they ordered Myers not to use a stun gun.

> Ladies and Gentlemen of the Jury, I charge you that the Defendant maintains he is entitled to use reasonable force not only to defend himself, or others, but to accomplish legitimate law enforcement objectives such as fingerprinting a suspect, photographing a suspect or maintaining order. If you find that the Defendant utilized reasonable force to accomplish a legitimate law enforcement objective, you must find the Defendant not guilty.

The court charged the jury:

> A law enforcement officer is justified in the use of only that force which he reasonably believes to be necessary to hold someone in custody or to defend himself or another from bodily harm. He may not, however, use more force than is reasonably necessary to accomplish those purposes. To determine whether the defendant used excessive force, you should consider all the circumstances in the case from the point of view of a reasonable officer on the scene of the incident. . . .
>
> [A] defendant is entitled to use reasonable force to accomplish legitimate law enforcement objectives. If you find that the defendant utilized reasonable force to accomplish a legitimate law enforcement objective, you must find the defendant not guilty.

This instruction is substantially the same as that proposed by Myers, with the exception that the court did not specify that defendant was entitled to use force in order to fingerprint or photograph a suspect. Moreover, the record

shows that Myers did not conduct fingerprinting and/or photographing of the suspects. The court did not err in not giving Myers' proposed jury instruction as to the theory of defense. *See United States v. McEvoy*, 820 F.2d at 1172.

III. EVIDENTIARY RULINGS

Myers contends that the court erred in making the following evidentiary rulings: 1) not admitting into evidence in its entirety a prior statement by Myers; 2) not admitting into evidence a prior statement of a witness for appellant; 3) allowing three lay witnesses to offer their opinions during their testimonies; 4) limiting the cross-examination of a government witness; and 5) admitting three items of demonstrative and real evidence into evidence.

"A court's evidentiary rulings are discretionary and will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Pendas-Martinez*, 845 F.2d 938, 941 (11th Cir.1988) (citations omitted).

A. Myers' Prior Statement

The statement at issue is a three-page signed, written statement that Myers made during a police internal affairs investigation on Myers' use of the stun gun on Yanez. The statement first came up at trial during cross-examination of Myers. The prosecution questioned Myers on the contents of his report and about the number of times he activated the stun gun. Myers replied that he activated the stun gun five or six times. The government marked the statement as government's exhibit 9 and provided the statement to Myers to refresh his recollection. The statement specified that Myers had used the stun

gun to shock Yanez four times. On direct examination, Myers had testified that he used the stun gun on Yanez five times. The prosecution used the statement to impeach Myers' testimony regarding the number of times that he used the stun gun on Yanez.

Defense moved for admission of the entire statement. The court refused this request and allowed only portions of the statement that were pertinent to the witness' testimony into evidence. Myers now contends that the court should have admitted the entire statement into evidence, pursuant to Rule 801(d)(1) of the Federal Rules of Evidence, which provides that a prior statement is not hearsay, and thus admissible, if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Fed.R.Evid. 801(d)(1)(B).

We find that because the court did admit the statement into evidence, albeit in a redacted form, Rule 801(d)(1)(B) does not support Myers' claim. "[A] trial court has discretion to exclude those parts of prior consistent statements that do not relate specifically to matters on which the defendant has been impeached." *United States v. Brantley*, 733 F.2d 1429, 1438 (11th Cir.1984), *cert. denied*, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985). The prosecution introduced into evidence portions of Myers' statement with respect to the number of times that Myers used the stun gun on Yanez; that was the impeachment purpose. Other information provided in the statement concerning the circumstances of Myers' use of the stun gun reflect his motivation and reason for the use of the gun. Myers objects to the jury not receiving information in his statement that described Yanez's threats to the po-

lice officers, the state of the stun gun's battery, the reasons why Myers used the stun gun, and what Yanez said before and after Myers used the stun gun on him. Not only were these facts not in dispute, they were testified to by Myers and other witnesses.

Myers also contends that Rule 106 of the Federal Rules of Evidence requires the admission of the entire statement into evidence. Under this "rule of completeness" when a part of a written statement is introduced by a party, the adverse party may require the introduction of any other part of the statement "which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. There are, however, limitations on the rule.

> A [ ] limitation on the rule of completeness, applicable in all cases, arises when the prosecution seeks only to introduce a portion of the defendant's statement. There, the defendant still has the right to introduce additional portions of his statement. But, this right does not entitle the defendant to introduce portions of his statement that are neither explanatory of nor relevant to those portions of the statement introduced by the prosecution.

United States v. Smith, 794 F.2d 1333, 1335 (8th Cir.) (citing *United States v. Marin*, 669 F.2d 73, 84-85 (2d Cir.1982)), *cert. denied*, 479 U.S. 938, 107 S.Ct. 419, 93 L.Ed.2d 370 (1986). As we have already explained, the prosecution introduced portions of Myers' statement for the purposes of impeaching Myers' testimony regarding the number of times he used the stun gun on Yanez. The information that was redacted from the statement had to do with events that were not pertinent to the impeachment

purpose. The court, therefore, did not abuse its discretion in excluding Myers' three-page statement in its entirety. *See United States v. Reed*, 887 F.2d 1398, 1405 (11th Cir.1989) (district court has broad discretion in determining admissibility of prior consistent statement and will not be disturbed on appeal absent a clear showing of abuse of discretion), *cert. denied*, 493 U.S. 1080, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990).

B. Prior Statement of Witness

Myers contends that the court abused its discretion when it refused to admit a statement that Yanez allegedly made to Officer Bice a few days after the incident giving rise to this action. Myers proffered that Bice would have testified that Yanez told him that, "if it wasn't for the old man (Myers), he would have beaten up the younger radio operator." The court sustained the government's objection to this testimony on the ground that Yanez was not given the opportunity to explain the statement pursuant to Rule 801(d)(1) of the Federal Rules of Evidence.[7]

Myers argues that Bice's testimony regarding Yanez's prior statement would have rebutted Yanez's earlier tes-

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[7] Rule 801(d)(1) provides in pertinent part that,

> A statement is not hearsay if—
> (1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding.

Fed.R.Evid. 801(d)(1)(A). This circuit has interpreted the term "subject to cross-examination" to mean that the witness must be available for recall and not that the witness must first be confronted with the impeaching statement before it could be proved by extrinsic evidence. *See Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521-23 (11th Cir.1986).

timony that he did not try to strike any of the officers. We find that even if the court had committed error, it was harmless. Yanez testified that he challenged various officers to a fight, yelled obscenities, told an officer to take off his badge so that they could fight, and threatened various officers. Even if the court had admitted the statement, it would have added little to Myers' case. In addition, the court's refusal to admit it did not prejudice Myers' case. Myers claims that Bice's testimony was crucial because "no other corroborating witness was called to testify on behalf of the Defendant." The record shows, however, that Myers had called Officer Robert Brown to corroborate his testimony about the Yanez affair. The court did not abuse its discretion in excluding Bice's testimony as to Yanez's statement.

C. Testimony of three lay witnesses

Myers contends that the court erred in allowing three lay witnesses, Officers Welch, Baker, and Fleming, to testify as to their opinions. The ultimate decision as to the admissibility of lay opinion testimony is committed to the sound discretion of the district court and will not be overturned on appeal unless there is clear abuse of discretion. *See United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 184, 93 L.Ed.2d 118 (1986). Rule 701 of the Federal Rules of Evidence permits a lay witness to offer his opinion if it is "rationally based on the perception of the witness and [is] helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue." Fed.R.Evid. 701.

Myers claims that the court should not have allowed Officer Welch to testify as to his opinion that the reddish burn marks on Yanez's back were consistent with marks

that would be left by a stun gun on the ground that his testimony went beyond the everyday common knowledge of a lay person. In addition, Myers argues that the proper foundation was not laid for Welch's testimony.

Welch's testimony was relevant to the determination of a fact in issue—whether the burn marks on Yanez's back were caused by the stun gun. His conclusion was rationally based upon his personal perception of Yanez's back and his nineteen years of experience on the police force. To the extent that Welch's opinion lacked a technical/medical basis, Myers had the opportunity to expose this on cross-examination. Myers' objection to the evidence goes to its weight and not to its admissibility. *See Dallis v. Aetna Life Ins. Co.*, 768 F.2d 1303, 1306 (11th Cir.1985). The trial court did not abuse its discretion in admitting this evidence.[8]

Myers further contends that the court abused its discretion in allowing Officer Bobby Joe Baker and radio dispatcher Fleming to offer a legal conclusion on the ultimate issue in the case. At trial, Baker testified that "based on [his] knowledge and experience," Myers' use of the stun gun on Yanez did not constitute reasonable force. Fleming testified that "based on what [he] saw" the use of the stun gun against Yanez the fourth and final time was "unjustified."

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[8] Moreover, the court gave the following instruction to the jury:

> Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

While asking whether force was "reasonable" or "justified" invades the province of the jury, this circuit has held that, considering the entirety of testimony, an expert witness can testify as to the prevailing standards in the field of law enforcement. *Samples v. City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir.1990). In *Samples*, this circuit found that the questions leading up to the expert's testimony and the manner in which he answered the question properly informed the jury that the expert was testifying regarding prevailing standards in his field. The defense questioned the expert on the industry standards for judging the appropriate use of force prior to soliciting his opinion as to the reasonableness of the officer's actions. The expert's answer was given in terms of the standards set out by a previous expert witness, which involved a three-pronged inquiry into the subject's ability to harm, his opportunity to harm, and whether someone was in jeopardy of being harmed by the subject at the time the officer used force against the subject. *Id.* at 1551.

In light of the questioning and answers given, we find that, as with the testimony in *Samples*, Baker properly framed his opinion in accordance with prevailing police standards.[9] The court did not err in admitting his

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[9] Baker's examination is provided in pertinent part,

> Q. ... [I]n the training that you have received, when you receive or somebody threatens you verbally, does that justify you using any physical force against them?
> A. No, it doesn't.
> Q. Does it matter what the nature of the threats are?
> A. No.
> Q. What is the rule on how you handle people who are being verbally abusive?
> A. They teach you in the academy when someone is begin real loud and yelling at you, you are supposed to start at their level and

testimony. *See Wade v. Haynes*, 663 F.2d 778, 784 (8th Cir.1981) (holding that question that amounted to an inquiry as to whether "defendant's conduct violated a constitutional norm," was permissible because the "jury had the right to be informed concerning prison policy" in assessing whether a correctional officer had violated a prisoner's civil rights), *aff'd on other grounds*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).

Myers also contends that Baker was not qualified as an expert witness to offer his opinion and that Baker was not experienced enough to evaluate Myers' conduct. A lay witness, however, is not precluded from offering his opinion. *See* Fed.R.Evid. 701. As for Baker's qualifications to judge Myers' use of the stun gun, the jury heard Baker's

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work your way down voicewise. So it is supposedly supposed to bring their voice down with you.

Q. If somebody is voicing obscenities to you, are you supposed to voice obscenities back?

A. No.

Q. And in your experience with dealing with people on the street, your experience both with the Doraville Police and with the other law enforcement experience that you have had, does that rule work on the street when you are dealing with people?

A. Yes, it does.

Q. Are you allowed to exact any physical punishment against anybody for making threats?

A. No, you are not.

Q. What does the use of reasonable force mean?

A. Minimum amount of force necessary to take the person into custody.

Q. Based on your knowledge of the standard and of proper police procedures and behavior back in September of 1989 when you saw Captain Myers shocking Mr. Yanez with the stun gun, in your view was that reasonable force?

[Defense objected on grounds of Rules 611(c) and 701 and was overruled.]

A. No, it wasn't.

qualifications and it was up to it to determine his credibility. This objection goes to the weight of the evidence rather than to its admissibility.

In reviewing Fleming's testimony, we find that a foundation was not laid for his testimony regarding Myers' unjustified use of the stun gun on Yanez. Unlike Baker's testimony, the prosecution did not elicit Fleming's response in the context of the prevailing standards of police behavior. It merely asked, "[b]ased on what you saw, was there anything to justify that use of the stun gun at the end that you were just telling us about?" to which Fleming answered, "[a]t the time I felt it wasn't necessary." This error, however, was harmless in light of the court's instructions to the jury that it was their "duty to decide . . . the specific facts," and whether to "accept . . . [and] rely upon an expert witness." *See United States v. Carrazana*, 921 F.2d 1557, 1568 (11th Cir.), *cert. denied*, __ U.S. __ 112 S.Ct. 191, 116 L.Ed.2d 152 (1991).

D. Limiting Cross-Examination of Government Witness

Myers contends that the court erred in not allowing him to cross-examine Officer Jett, a government witness, about certain incidents of misconduct in order to show bias. Myers proffers that had the court permitted it, he would have cross-examined Jett regarding the following events that occurred in 1986 when Myers served as watch commander: 1) a complaint filed with the Doraville Police Department against Jett for furnishing alcoholic beverages to two minors; 2) Jett's forced resignation from the Department for leaving work on false pretenses; and 3) after reinstatement to the Department, shooting out a television monitor after mistakenly believing that he had

removed all the bullets from his gun.[10] The court ruled that Myers could cross-examine Jett on incidents that showed some connection to Myers that would indicate bias by Jett. The court determined that the mere fact that Jett was disciplined on other occasions was irrelevant.[11] The court did allow the defense during direct examination of Myers to ask questions regarding the incidents to reflect possible bias on the part of Jett.[12]

Delineating the scope of cross-examination is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *See United States v. Casamayor*, 837 F.2d 1509, 1514 (11th Cir.1988), *cert. denied*, 488 U.S. 1017, 109 S.Ct. 813, 102 L.Ed.2d 803 (1989); *United States v. Orr*, 825 F.2d 1537, 1540 (11th Cir.1987);

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[10] Myers contends on appeal, for the first time, that the court should have allowed him to cross-examine Jett on 1) an investigation on Jett's use of a nightstick or flashlight on a prisoner; and 2) Myers' role in an investigation on Jett's possession of rented videotapes that were past due. Because he never sought to cross-examine Jett about either of these incidents on trial, Myers is now precluded from raising these claims on appeal. *See United States v. DiPaolo*, 804 F.2d 225, 230 (2d Cir.1986).

[11] The court explained,

> Had you offered to ask the witness whether he knew of or believed that Captain Myers had instituted any disciplinary investigation that resulted in his being disciplined, I think that may well have been an appropriate question rather than trying to go into the substance of other violations this witness may have been involved in that have nothing to do with this case.

[12] The court ruled,

> I am not going to allow you to go into what the incidents may or may not have been. I don't think that has any relevance with regard to Officer Jett's testimony. But, if you can lay the foundation that there was a disciplinary process with regard to Officer Jett, and that Captain Myers participated in that and Officer Jett was aware of that, then I think that would reflect upon the possible bias of the witness.

United States v. Darwin, 757 F.2d 1193, 1202 (11th Cir.1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 896, 88 L.Ed.2d 930 (1986). While the Sixth Amendment guarantees a defendant the right to cross-examine witnesses, that right "is not unlimited." *United States v. Alonso*, 740 F.2d 862, 875 (11th Cir.1984), *cert. denied*, 469 U.S. 1166, 105 S.Ct. 928, 83 L.Ed.2d 939 (1985); *see also United States v. Calle*, 822 F.2d 1016, 1020 (11th Cir.1987). There was no abuse of discretion here.

E. Court's Rulings on Demonstrative Evidence

Myers contends that the court erred in: 1) admitting into evidence a photograph of a bunk in a cell at the station; 2) allowing the prosecution to activate the stun gun before the jury; and 3) refusing to permit a tape to be played in its entirety.

We find that the court did not abuse its discretion in admitting into evidence a photograph of a bunk in a cell at the Doraville Police Station that was not the actual cell in which Cowan was held. Officer Fleming testified on direct examination that the photograph "fairly and accurately" depicted the bunk on which Mr. Cowan was placed, except that the actual bunk was on the opposite side. Myers argues that the admission of the photograph confused the issue of Cowan's location when the stun gun was used and impaired the cross-examination of Officer Jett and Cowan. Myers could have easily remedied any confusion by reminding the witnesses and jurors that the actual bunk was on the opposite side. Moreover, there was nothing in the record to indicate that the witnesses were confused. There is no basis upon which to find that the court erred in admitting the photograph.

Myers next contends that the court erred in allowing the prosecution to activate the stun gun with a fully charged battery before the jury because the battery was weaker when he used the stun gun on Yanez and Cowan. Before the trial commenced, Myers had objected to the demonstration of the stun gun, with a new battery in it, before the jury. The court ruled that it would allow defense counsel to reserve an objection at the time the prosecution wished to demonstrate the stun gun and would then instruct the jury that it was an issue for them to decide. The court did as it promised. When the prosecution demonstrated the use of the stun gun in front of the jury, the court gave the following instruction,

> Members of the jury, in connection with the demonstration, I would advise you or instruct you that it is your duty to determine whether the demonstration accurately reflects the condition of the stun gun on the occasion in question. In that regard, the battery on the stun gun has been recently recharged. But it is an issue for you to determine whether it presently has the—whether it presently operates in the same manner as it did on the date in question.

There was testimony to the effect that the stun gun was not fully charged on the incident dates and that the victims themselves did not react in a normal fashion to application of a fully charged stun gun.

We note first that Myers did not preserve this argument for appeal because defense counsel failed to raise an objection when the prosecution demonstrated the use of the stun gun. At any rate, the court cured any prejudice by instructing the jury as to the factual issue

involved.[13] If the court erred, it was harmless. *See United States v. Lang*, 904 F.2d 618, 627 (11th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990); *Robin v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1239 (5th Cir. Unit B 1982).

Myers contends that the court erred by not permitting defense counsel to play a thirty-five minute tape of Cowan in jail in its entirety. The government played a portion of the tape that had Cowan yelling for a doctor and cursing at a female in an adjacent cell. Defense counsel objected and requested that the entire tape be played pursuant to Rule 106 of the Federal Rules of Evidence. The court ruled that Myers could play specific portions of the tape or a representative portion. The rest of the tape depicted Cowan yelling, cursing, and slamming the broken bunk. The purposes of Rule 106 would not have been served by playing the entire tape. Moreover, the court gave defense counsel the opportunity to select portions of the tape to rebut Cowan's testimony that he was docile at the time of the stun gun incident. The court did not abuse its discretion. *See Bury v. Marietta Dodge*, 692 F.2d 1335, 1338 (11th Cir.1982).

The district court judgment is *affirmed*.

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[13] We fail to see any merit to Myers' argument that the government's repeated demonstrations of the stun gun before the jury prejudiced the jury and prevented a fair trial because defense counsel activated the stun gun before the jury on numerous occasions. *See, e.g.*, Tr. at 257, 260, 763, 834.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8567

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARL HAROLD MYERS,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: BIRCH, Circuit Judge, JOHNSON and BOWNES*, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

Supreme Court, U.S.
FILED
MAR 12 1993
OFFICE OF THE CLERK

No. 92-1177

In the Supreme Court of the United States

OCTOBER TERM, 1992

CARL HAROLD MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by instructing the jury that petitioner's use of a stun gun on persons held in custody at a police station should be evaluated under the reasonableness standard of the Fourth Amendment.

2. Whether 18 U.S.C. 242 is void for vagueness because it does not define the term "bodily injury."

3. Whether the district court, which explained that "[b]odily injury * * * includes physical pain as well as any burn or abrasion," Pet. App. 17a, properly instructed the jury as to the meaning of that term.

4. Whether the district court abused its discretion by allowing petitioner's stun gun to be activated before the jury and by refusing to permit a 35-minute tape recording to be played in its entirety during the trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1177

CARL HAROLD MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 9a-36a) is reported at 972 F.2d 1566.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1992. A petition for rehearing was denied on November 30, 1992. The petition for a writ of certiorari was filed on January 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of depriving persons of their civil rights by shocking them with a stun gun, in violation of 18 U.S.C. 242. Pet. App. 9a-10a.[1] One of the counts of conviction was charged as a felony, because petitioner's actions resulted in bodily injury.[2] Petitioner was sentenced to concurrent terms of 12 and 18 months' imprisonment on the two counts. *Id.* at 14a.

1. Petitioner was a Captain with the Doraville, Georgia, Police Department. A stun gun is not an authorized weapon of the Doraville Police Department, and petitioner had been so advised by both the Chief and the Assistant Chief of Police. Pet. App. 10a, 11a, 22a n.6.

On August 25, 1988, at about 1:30 a.m., Frederick Cowan was arrested for driving under the influence of alcohol and resisting arrest. Cowan was transported to the Doraville police station and placed in a holding cell. Throughout the night, Cowan yelled, kicked the bars of his cell, and asked to see a doctor. At approximately 5:15 a.m., petitioner entered Cowan's cell along with two police dispatchers. Petitioner told Cowan to lie down and stretch his hands above his head so that they could be handcuffed to the bunk. Cowan, who was sitting on the bunk, was slow to respond. Petitioner then activated a stun gun on Cowan's chest. Cowan screamed loudly, flinched, and appeared to be in pain. After Cowan's hands were cuffed to the bunk, petitioner shocked Cowan in the

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[1] The jury did not reach a verdict on a third count charging a similar violation of 18 U.S.C. 242.

[2] Prior to November 1988, all violations of 18 U.S.C. 242, except those resulting in death, were misdemeanors. In November 1988, Congress amended the statute to provide that "if bodily injury results," the defendant is subject to ten years' imprisonment.

groin area. Cowan again screamed loudly and flinched. At the time Cowan was shocked, he had not yet been booked, fingerprinted, or formally charged with a crime by the police or any judicial officer. Pet. App. 10a-12a.

On September 21, 1989, Cesar Yanez was arrested in a parking lot for having an open can of beer in public. Yanez yelled obscenities as he was being transported to the police station. At the station, he continued to yell obscenities and challenged various officers to a fight. Yanez was then placed in a holding cell. A few minutes later, petitioner and a radio dispatcher escorted Yanez to the back of the station to be booked and processed. As Yanez walked down the hall petitioner shocked him in the back several times with a stun gun. Yanez was then told to place both hands against a wall and spread his legs so that he could be searched. While Yanez had his hands on the wall, petitioner shocked him several more times in the lower neck and back area. A few days later, a police officer observed six pairs of scabbed reddish burn marks, consistent with those left by a stun gun, on Yanez's back. Pet. App. 12a-14a.

2. The court of appeals affirmed petitioner's convictions. It first held that the district court did not commit plain error when it instructed the jury to evaluate petitioner's use of force under the reasonableness standard of the Fourth Amendment. The court explained that because petitioner had argued at trial that his conduct should have been evaluated under the Eighth Amendment, it would not resolve his belated claim on appeal that his use of force should have been analyzed under the Fourteenth Amendment's due process standard. The court added that "[a]lthough we uphold the instruction given, we wish to make it explicit that we are not deciding that the Fourteenth Amendment's * * * standard does not apply in evaluating the use of excessive force by the police in post-arrest, pre-charge cases. That issue is

not before us. We hold only that it was not plain error for the district court to give the instruction it did." Pet. App. 16a.

The court of appeals also rejected petitioner's claim that the district court improperly instructed the jury as to the definition of "bodily injury," which the court defined to "include[] physical pain as well as any burn or abrasion." Pet. App. 17a. The court held that the district court correctly defined "bodily injury" since its definition was consistent with the definition Congress had previously used in other criminal statutes. See 18 U.S.C. 831(f)(4) (prohibited transactions involving nuclear materials); 18 U.S.C. 1365(g)(4) (tampering with consumer products); 18 U.S.C. 1515(a)(5) (obstruction of justice); 18 U.S.C. 1864(d)(2) (hazardous or injurious devices on federal lands). Pet. App. 17a-19a.

The court of appeals further held that the district court did not abuse its discretion by allowing the stun gun to be activated before the jury with a fully charged battery. The court first noted that petitioner had waived any claim of error regarding the stun gun demonstration, since he had failed to object when the gun was activated. The court further held that, in any event, the demonstration was proper in light of the district court's cautionary instruction informing the jury that the battery had been recently recharged and that it "is your duty to determine whether the demonstration accurately reflects the condition of the stun gun on the occasion in question." Pet. App. 35a-36a. In addition, the court held that even if the district court had erred in allowing the demonstration petitioner was not prejudiced, as evidenced by the fact that during the trial he and his counsel chose to activate the gun before the jury on numerous occasions. *Id.* at 36a n.13.

The court of appeals also held that the district court did not err by refusing to permit petitioner to play in its

entirety a 35-minute tape recording of Cowan yelling in his cell. The court noted that petitioner was allowed to play "specific portions of the tape or a representative portion," which allowed him "the opportunity * * * to rebut Cowan's testimony that he was docile at the time of the stun gun incident." Pet. App. 36a.

ARGUMENT

1. Petitioner first contends (Pet. 13-14) that the claim that he used excessive force should have been evaluated under the Due Process Clause of the Fourteenth Amendment rather than the reasonableness standard of the Fourth Amendment.

In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), this Court held that "*all* claims that law enforcement officers have used excessive force * * * in the course of an arrest, investigatory stop, or other 'seizure' * * * should be analyzed under the Fourth Amendment['s] * * * 'reasonableness' standard." The Court explained that claims of excessive force should not be evaluated under the "more generalized notion of 'substantive due process'" when a more specific constitutional provision governs. *Id.* at 393-394, 395. Nonetheless, the Court expressly left open "the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Id.* at 395 n.10.

"[T]he Fourth Amendment provides an explicit textual source of constitutional protection," *Graham*, 490 U.S. at 395, for individuals who have been seized pursuant to police authority, are in police custody, and have yet to be arraigned. It protects persons from unreasonable searches and seizures, and this Court has held that "if an arrestee is taken to the police station, that is * * * a continuation of the custody inherent in the arrest

status." *Illinois* v. *Lafayette*, 462 U.S. 640, 645 (1983). See also *Dunaway* v. *New York*, 442 U.S. 200, 208 (1979). This Court has also held that "the manner in which a search or seizure is conducted" is subject to Fourth Amendment analysis. *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985).

Since this Court's decision in *Graham* v. *Connor*, the courts of appeals that have squarely addressed the issue have recognized that the Fourth Amendment applies to a claim that an officer used excessive force against a person in police custody. See, *e.g.*, *Powell* v. *Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989); *Foster* v. *Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990); *Hammer* v. *Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989), vacated en banc on other grounds, 932 F.2d 842, 845 n.1, 850-851 (9th Cir.), cert. denied, 112 S. Ct. 582 (1991); *Austin* v. *Hamilton*, 945 F.2d 1155, 1158-1160 (10th Cir. 1991). Cf. *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990) (pretrial detainee's claim that police officer used excessive force while he was detained at the station evaluated under the due process standard), cert. denied, 111 S. Ct. 758 (1991).

Regardless of whether those courts are correct, further review is not warranted in this case, because the court of appeals did not hold that the Fourth Amendment standard applied to petitioner's conduct. At trial, petitioner argued only that an Eighth Amendment standard should be used, an argument petitioner subsequently abandoned. Because petitioner had relied on the Eighth Amendment and not the Fourteenth, the court of appeals refused to decide whether the Fourteenth Amendment's due process standard, rather than the Fourth Amendment's reasonableness standard, applies to a claim that a police officer used excessive force in a post-arrest, pre-charge case. Pet. App. 16a. Instead, the court merely held that the district court's instruction that the jury

should evaluate petitioner's use of force under the Fourth Amendment's reasonableness standard was not plain error in this case. *Ibid.* Therefore, contrary to petitioner's claim (Pet. 14), the court of appeals' decision does not conflict with *Wilkins* v. *May*, 872 F.2d 190 (7th Cir. 1989), cert. denied, 493 U.S. 1026 (1990), where the Seventh Circuit held that a claim that a police officer acted unlawfully when he interrogated a person at gunpoint should be evaluated under the due process standard.[3]

2. Petitioner also contends (Pet. 15-17) that 18 U.S.C. 242 is unconstitutionally vague because the term "bodily injury" is not defined in the statute. While petitioner contended at trial that the statute was unconstitutionally vague as applied, he did not challenge the constitutionality of the statute on appeal. Pet. App. 17a. Thus, the court of appeals did not rule on that issue. Ordinarily, this Court does not grant certiorari to review an issue that was neither pressed nor passed on in the court below. *United States* v. *Williams*, 112 S. Ct. 1735 (1992).

In any event, "bodily injury" has a settled meaning. As the court of appeals recognized, the district court's instruction defining the phrase is consistent with the definition of "bodily injury" contained in four other provisions of Title 18 of the United States Code. See 18

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[3] Any conflict between the Seventh Circuit's decision in *May* and the decisions of other circuits is of questionable importance in light of the Seventh Circuit's subsequent decision in *Titran* v. *Ackman*, 893 F.2d 145 (1990). In *Titran*, the Seventh Circuit said that "[m]ost of the time the propriety of using force on a person in custody pending trial will track the Fourth Amendment." *Id.* at 147. The court went on to conclude that "[i]f the officers intentionally restrained, jolted, and roughed up Titran without physical provocation from her, their behavior was unreasonable." *Id.* at 148. Thus, it appears that the Seventh Circuit would have reached the same result as the Eleventh Circuit in this case.

U.S.C. 831(f)(4) (prohibited transactions involving nuclear materials); 18 U.S.C. 1365(g)(4) (tampering with consumer products); 18 U.S.C. 1515(a)(5) (obstruction of justice); 18 U.S.C. 1864(d)(2) (hazardous or injurious devices on federal lands). Pet. App. 18a-19a. In each of those provisions, "bodily injury" is defined as: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of * * * function of bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." In accordance with that definition, the district court in this case instructed that "bodily injury means any injury to the body, no matter how temporary," and "includes physical pain as well as any burn or abrasion." Pet. App. 17a.

It is well settled that the test for determining whether a criminal statute is sufficiently definite so as not to violate the Due Process Clause is whether it "give[s] a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Batchelder*, 442 U.S. 114, 123 (1979), quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). See *United States* v. *Powell*, 423 U.S. 87, 94 (1975); *Rose* v. *Locke*, 423 U.S. 48, 49 (1975) (per curiam). The type of injury inflicted by a stun gun—pain and often an associated burn—is the type of injury that a person of ordinary intelligence, familiar with the operation and effect of the weapon, would understand to constitute "bodily injury."

Moreover, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti* v. *Franklin*, 439 U.S. 379, 395 (1979). See *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342 (1952). The statute at issue in this case requires the government to prove that the defendant used excessive force willfully. Indeed, in *Screws*

v. *United States*, 325 U.S. 91, 101-102 (1945), this Court rejected a claim that the predecessor statute to 18 U.S.C. 242 was void for vagueness, because the statute required a defendant to act with specific intent. The Court explained, "[t]he requirement that the act must be willful or purposeful * * * relieve[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.* at 102.

There is no merit to petitioner's claim (Pet. 16) that this Court's decision in *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), suggests that 18 U.S.C. 242 is void for vagueness. In *Maynard*, this Court held that an Oklahoma statute allowing a jury to consider whether a murder was "especially heinous, atrocious, or cruel" in deciding whether to impose the death penalty was unconstitutionally vague under the Eighth Amendment. *Id.* at 359, 363-364. *Maynard* is inapplicable because petitioner was not convicted of a capital offense. Indeed, because of the qualitative difference between death and other sentences, this Court has repeatedly recognized that it has applied heightened scrutiny to statutes providing for capital sentences. See, *e.g.*, *California* v. *Brown*, 479 U.S. 538, 541 (1987); *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (opinion of Marshall, J.); *California* v. *Ramos*, 463 U.S. 992, 998-999 (1983). Moreover, even in capital cases, this Court has held that a defect arising from a vague statutory sentencing term can be rectified by a limiting instruction that defines the term for the jury. *Walton* v. *Arizona*, 497 U.S. 639, 653-655 (1990); *Maynard* v. *Cartwright*, 486 U.S. at 364-365. See also *Proffitt* v. *Florida*, 428 U.S. 242, 255-256 (1976) (plurality opinion). The district court in this case gave a detailed limiting instruction defining the term "bodily injury." See Pet. App. 17a.

3. Nor is there merit to petitioner's argument (Pet. 15-17) that the district court improperly applied a "civil

definition" when it instructed the jury as to the meaning of "bodily injury." As we have noted, the district court in its instructions used the definition provided in other federal criminal statutes. The definition of injury used by the court was therefore not a "civil" definition.

The decision of the court of appeals is not inconsistent with *Bennett* v. *Parker*, 898 F.2d 1530 (11th Cir. 1990), *Mark* v. *Caldwell*, 754 F.2d 1260 (5th Cir. 1985), or *Raley* v. *Fraser*, 747 F.2d 287 (5th Cir. 1984), as petitioner contends. In those cases (all of which arose under 42 U.S.C. 1983, not 18 U.S.C. 242), the courts considered the extent of injury required to establish a violation of constitutional rights, and held that a claim alleging excessive force was properly denied because the plaintiff suffered only minor injuries.[4] In this case, however, the evidence showed that Yanez was stunned badly enough that he had "six pairs of scabbed reddish burn marks" on his back. Pet. App. 13a-14a. Furthermore, subsequent to the decisions cited by petitioner, this Court explained that the extent of lasting physical injury alone is not determinative of whether the use of force by a law enforcement official constitutes a constitutional violation. *Hudson* v. *McMillian*, 112 S. Ct. 995 (1992). See also *Whitley* v. *Albers*, 475 U.S. 312, 321 (1986). The duration of the signs of injury should not be the benchmark for determining whether there has been a violation, because "[m]any things—beating with a rubber truncheon, water torture, [and] electric shock * * * may cause agony as they occur yet leave no enduring injury." *Williams* v. *Boles*,

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[4] Contrary to petitioner's claim (Pet. 16), in *Culver* v. *Town of Torrington*, 930 F.2d 1456 (10th Cir. 1991), the plaintiff's Section 1983 claim was not disallowed because of the insignificance of the injury. Rather, as the court of appeals explained, "[t]here was no evidence as to where or how the bruises occurred or more specifically, that the bruises were a result" of the police officer's conduct. *Id.* at 1461.

841 F.2d 181, 183 (7th Cir. 1988). Just because the State "is careful to leave no marks" does not mean that the conduct is not serious. *Ibid.*

4. Petitioner also contends (Pet. 17-19) that the court of appeals erred by concluding that the district court did not abuse its discretion with regard to two evidentiary rulings. Petitioner's claims of error are meritless and, in any event, the court of appeals' fact-bound determinations are not worthy of further review.

Petitioner first argues (Pet. 17-18) that the district court abused its discretion by allowing the stun gun to be activated before the jury, and that the court of appeals "did not address why the [district] court decided to favor the government's contention that the stun gun was *fully charged* at the time of the events as opposed to the Defendant's opposite contentions." The district court, however, made no judgment as to the condition of the stun gun at the time of the various incidents, as evidenced by its instruction that the jury should determine whether the stun gun "presently operates in the same manner as it did on the date in question." Pet. App. 35a. In any event, petitioner has no basis to complain about the demonstration, since he and his counsel chose to activate the stun gun before the jury on several occasions. *Id.* at 36a n.13.

Petitioner also asserts (Pet. 18-19) that the district court abused its discretion by refusing to permit the 35-minute tape recording of Cowan yelling in his cell to be played in its entirety. As the court of appeals explained, the district court did not err because petitioner was allowed to play a representative sample of the tape. Pet. App. 36a. In any event, the tape recording was merely cumulative of other evidence establishing that Cowan spent the night yelling and rattling the bars of his cell and calling for a doctor before petitioner arrived at the station. Tr. 236-237, 307, 385, 828-829. In addition, all the

exhibits were sent back to the jury room at the beginning of the deliberations, Tr. 991-992, so the jury had the opportunity to listen to the tape in its entirety if it so desired.

Accordingly, there is no merit to petitioner's claim (Pet. 19) that the court of appeals' decision is inconsistent with *United States* v. *Ebens*, 800 F.2d 1422 (6th Cir. 1986), and *Steward* v. *Dameron*, 460 F.2d 278 (5th Cir. 1972) (per curiam). In those two cases, the courts held that the district courts committed reversible error by failing to play tape recordings that provided key evidence on the critical disputed issue at trial. Unlike those cases, the unplayed portion of the tape at issue in this case was cumulative, and it provided evidence pertaining to facts that were not in dispute—*i.e.*, what occurred prior to the time that petitioner entered Cowan's cell.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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